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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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JAN 11 2005

FILE: EAC 03 212 51846 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(i), states:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> > (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
> >
> > (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Section 101(a)(32) of the Act provides:

> The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

The regulation at 8 C.F.R. § 204.5(k)(2) states, in pertinent part:

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The record reflects that petitioner serves as President and General Manager of the [redacted] Electric Company in China. The petitioner's occupation does not meet the regulatory definition of a profession at 8 C.F.R. § 204.5(k)(2) because the occupation is not listed in section 101(a)(32) of the Act, and a bachelor's degree is not required for entry into the occupation. There is no evidence that there is any mechanism in place that would prevent an individual with no bachelor's degree from becoming a company president. In regard to the petitioner's educational qualifications, the record contains a translated certificate stating: "This is to certify that [the petitioner] was admitted to the Electrical Engineering...program, junior college level for two years, of the Department of Electrical Engineering of Zhejiang University in September 1984; with satisfied standing, she graduated in June 1986." Two years of junior college is not adequate to satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(i). Therefore, as the President of the [redacted] Electric Appliance Company, the petitioner does not qualify as a professional, as defined by the pertinent regulations.

Because the petitioner does not qualify as an advanced-degree professional, she cannot receive a visa under section 203(b)(2) of the Act unless she qualifies as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which must be satisfied for an individual to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note here that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The petitioner's completion of only two years of junior college is not adequate to demonstrate exceptional ability in business. The petitioner must demonstrate that her academic record is "significantly above that ordinarily encountered" among company presidents.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

A letter from [redacted] Electric Appliance Company notes that the petitioner established the company in 1999. Counsel cites the petitioner's resume as evidence that the petitioner "has more than ten years of professional experience in the occupation sought." We note, however, that the plain wording of this criterion requires "letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience" to be submitted as evidence. A resume provided by the petitioner does not meet this requirement.

A license to practice the profession or certification for a particular profession or occupation.

The petitioner presented the business license for [redacted] Electric Appliance Company (issued by the Shengzhou Municipal Administration). A business license granted by a local municipality demonstrates only that the petitioner has registered her company and that it conforms to certain regulations. There is no indication that such a license distinguishes the petitioner from other businesspersons or company presidents.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The purpose of this criterion is to demonstrate that the petitioner's exceptional ability has earned her compensation that exceeds that of others in her field. Other company presidents clearly form the baseline against which the petitioner's salary or remuneration must be measured.

The petitioner submitted a letter from the [redacted] Electric Appliance Company stating: "[The petitioner] has monthly salary of RMB Yuan eight thousand, and her annual income amounts to RMB Yuan eighteen thousand..."

The petitioner also submitted a listing of "China's 10 Top-Earning Professions" printed from *www.tdctrade.com.* This listing does not include company presidents. Counsel states: According to a published list of "China's 10 Top-Earning Professions," Computer Software Developer is the highest professional position in China. As detailed, annual earnings in this profession are approximately RMB Yuan 50,000. The petitioner's salary is nearly double this figure." The petitioner, however, is not a computer software developer, nor is her company involved in the computer software business. Therefore, counsel's use of salary statistics for "Computer Software Developers" as a basis for comparison is seriously flawed.

The petitioner offers no acceptable basis for comparison to show that her salary amount is "significantly above that ordinarily encountered" among company presidents. Furthermore, the monthly salary of "RMB Yuan eight thousand" and annual income of "RMB Yuan eighteen thousand" indicated in the letter from [redacted] Electric Appliance Company are conflicting. A monthly salary of "RMB Yuan eight thousand" would amount to an annual income of RMB Yuan 96,000 not "eighteen thousand" as stated in the letter. The petitioner has not resolved this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Evidence of membership in professional associations.

Counsel asserts that the petitioner "is the part-time Chairman of the Shengzhou Women Entrepreneurs Association, Director of the Shengzhou Entrepreneurs Association, and Permanent Director of the Shengzhou Commercial Chamber." The record, however, contains no evidence of the petitioner's membership in these associations or their requirements for admission to membership. Without first-hand evidence to support counsel's claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The petitioner provided evidence of her receipt of several local and provincial awards, thus satisfying this single criterion. The petitioner also submitted a few articles about herself and her company appearing in the local media.

For the reasons explained above, the available evidence is not adequate to satisfy at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The record portrays the petitioner as running a successful business operation in China, but the record does not establish that the petitioner exhibits a degree of expertise significantly above that normally encountered among company presidents.

Thus, the record contains no persuasive argument or evidence that the petitioner is a member of the professions, as the pertinent regulations define that term, or that the petitioner qualifies as an alien of exceptional ability. The director's decision, however, did not address the petitioner's eligibility as an alien of exceptional ability. The remaining issue to be determined, then, is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. This issue is moot, because the petitioner is ineligible under the classification sought, but the issue will be discussed because it was central to the director's decision.

Neither the statute nor regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The

petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given occupation is so important that any alien qualified to work in this occupation must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that she merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

The petitioner submitted a letter from the [redacted] Electric Appliance Company stating: "This is to certify that [the petitioner]...established [redacted] Electric Appliance Co., Ltd. in 1999. She acts as general manager and is in full charge of manufacture and management of this company, which is specialized in producing and selling room air conditioners and other domestic electric appliances."

As discussed previously, the petitioner submitted evidence of local and provincial prizes that she has won and information regarding her professional memberships. We note, however, that recognition and professional memberships are criteria for classification as an alien of exceptional ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for this classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest.

Citizenship and Immigration Services (CIS) acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner must still demonstrate that she will serve the national interest to a substantially greater degree than do others in her industry.

The petitioner submitted evidence from the Patent Office of the People's Republic of China indicating that she co-designed a patent for a single-phase torque wiring motor. The granting of a patent documents that an innovation is original, but not every patented invention constitutes a significant contribution to one's field. Of far greater relevance in this proceeding is the importance to the greater industry of the petitioner's innovation. The record contains no evidence showing that the petitioner's invention was successfully marketed on a national scale or received superior product rankings in national trade publications. Nor is there evidence regarding the number of units sold that would demonstrate the patented motor's national impact.

Counsel states that the petitioner "contributed to scholarly articles" that resulted in the single-phase torque wiring motor patent. Publication, by itself, is not a strong indication of impact in one's field, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given published article attracts the attention of other scholars, those scholars will cite the source

article in their own published work. Numerous independent citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by individuals in the petitioner's industry, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — resulted from the petitioner's scholarly articles. In this case, the record contains no evidence of cites to the petitioner's scholarly articles.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted her response letter, a letter from counsel, and copies of documentation previously submitted.

The petitioner states:

> Please note that while I will work from an office and my company is likely to be located in a set geographic location, the fact that my company will create jobs for U.S. workers will have a positive effect on the United States as a whole. For example, when individuals are unemployed, it has a negative effect on the United States as whole.
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> * * *
>
> Each and every individual who becomes a viable taxpayer instead of a tax-taker provides a boost to the U.S. economy as a whole. I intend to provide jobs that will facilitate that boost.

The petitioner's potential to impact the U.S. economy by creating jobs in the United States is entirely speculative. Furthermore, according to the petitioner, the jobs created will likely be limited to a particular locality. *Matter of New York State Dept. of Transportation* indicates that while education and pro bono legal services are in the national interest, the impact of an individual teacher or lawyer would be so attenuated at the national level as to be negligible. *Id.* at 217, note 3. We find such reasoning applicable to the petitioner's business plans as well. In this case, the petitioner's impact on the economy would generally be limited to the local community in which she establishes her company.

We note that, aside from the national interest waiver that attaches to the visa classification sought by the petitioner, there exists a less restrictive immigrant visa classification specifically for employment creation. Section 203(b)(5) of the Act was established for individuals seeking to enter the United States for the purpose of engaging in a commercial enterprise that will hire at least ten United States citizens. Congress' creation of Section 203(b)(5) of the Act shows that a separate, less restrictive visa classification is intended for those aliens seeking to create jobs for U.S. workers.

Counsel's letter responding to the director's request for evidence discusses the petitioner's evidence as it relates to the regulatory criteria for aliens of exceptional ability. In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. As has been observed in *Matter of New York State Dept. of Transportation*, a plain reading of the statute and regulations shows that aliens of exceptional ability and members of the professions holding advanced degrees are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job

offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor, by itself, does not compel CIS to grant a national interest waiver of the job offer requirement. As stated previously, the issue here is whether the petitioner's contributions in the field are of such unusual significance that she merits the special benefit of a national interest waiver, over and above the visa classification sought. In seeking the additional benefit of a national interest waiver, the petitioner in this case must provide evidence demonstrating that she has significantly influenced her industry.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director concluded that the proposed benefits of the petitioner's work would not be national in scope.

On appeal, the petitioner provides a listing of the countries where her company does business and evidence of its international business transactions. We accept that the petitioner has contributed to the business endeavors undertaken by her company, but her ability to impact the greater industry beyond her company's transactions has not been adequately demonstrated. The performance of managerial services for a foreign company is of interest mainly to that particular company.

Counsel states:

> [P]lease note that the petitioner's company produces a product, electrical appliances, that will be distributed both nationally and internationally, and not only to the specific geographic location of the office . . . . While the company may be in one specific set location, the positive impact from the sale of the company's products will be felt on both a national and international level.

The petitioner engages in what is, inherently, an international endeavor involving yearly sales of perhaps a few million dollars. It has not been shown that her company enjoys a greater market share or has been significantly more successful at the national level than other U.S. businesses that manufacture electrical appliances (such as, for example, General Electric). Nor has the petitioner shown that her company provides a service of intrinsically greater value than that of other viable electrical appliance manufacturers. The petitioner, like any other company president, plays a significant role in directing the activities of her company. The statute, however, does not automatically qualify business owners for the national interest waiver, and the petitioner does not establish the relative importance of her activities simply by describing them. By law, advance degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. With regard to Congressional intent, a statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule. The nature of the petitioner's work is to ensure that her company's products are sold overseas; simply being a competent businessperson is not adequate to demonstrate eligibility for a national interest waiver.

We find that the evidence presented in this case is not adequate to demonstrate that the petitioner's work has had or will have a nationally significant impact on the U.S. economy or the U.S. electrical appliance industry in general. Many of the assertions made by the petitioner in this case (such as her intent to hire U.S. workers) are entirely speculative. Beyond demonstrating that she has served as an effective company president, the

petitioner must show that her work is viewed throughout the U.S. electrical appliance manufacturing industry as particularly beneficial to this country.

In this matter, the available evidence does not persuasively demonstrate that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. In any event, we cannot consider the petitioner for the national interest waiver if she has not shown that she qualifies for the underlying classification. The petitioner runs a successful foreign business, but her talent does not rise to a level of exceptional ability or meet the higher burden of national interest.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.